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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DONALD RALPH PIERCE, Defendant and Appellant.	G050799 (Super. Ct. No. 14CF0536) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kimberly Menninger, Judge. Affirmed as modified.

Richard Jay Moller, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Elizabeth M. Carino, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

After the jury found defendant Donald Ralph Pierce guilty of carjacking (Pen. Code, § 215; all further undesigated statutory references are to this code) and the unlawful taking of a vehicle (Veh. Code, § 10851, subd. (a)), the trial court sentenced him to 16 years in state prison.

Defendant timely appealed and argues there was insufficient evidence to support a conviction of carjacking at the time he moved for a judgment of acquittal. We disagree. Defendant also maintains his concurrent sentence for unlawful taking of a vehicle should be stayed under section 654 because his convictions for carjacking and vehicle taking were based on the same act. We agree. Therefore, we shall affirm defendant's conviction, but instruct the superior court clerk to modify the abstract of judgment so that the sentence imposed for unlawful taking of a vehicle is stayed under section 654.

FACTS

1. Background Information

Anthony Alaimo, the victim, lived in an apartment with his fiancée Sheila Baca. Together, they owned two pick-up trucks—a Ford F-150 and Dodge Dakota—which were titled, registered, and insured under both of their names. Each truck had two sets of keys which were kept inside their apartment.

Defendant moved in with Alaimo who was his friend. Around the same time, defendant also began to borrow the Dakota, primarily driven by Alaimo, to run errands and complete certain jobs. Later, Alaimo and defendant began to have disagreements regarding defendant's use of the truck and defendant agreed to leave Alaimo's apartment with plans on moving to Las Vegas.

However, a few weeks later, defendant asked to borrow the Dakota to purchase some items to take on his move to Las Vegas. Alaimo agreed to lend him the

truck for this purpose. But, defendant failed to return the truck despite Alaimo's repeated text messages and voicemails requesting it back.

2. The Incident

The third night defendant failed to return the Dakota, Alaimo and Baca tracked defendant's location using a Google GPS computer application with the hopes of retrieving the vehicle from him. They were able to locate the Dakota parked at a shopping center. Alaimo drove to that location, parked the F-150 he was driving, and used his keys to get into the Dakota to drive it across the street to a different parking lot. Alaimo locked the Dakota and went to retrieve his F-150, which he then parked at a perpendicular angle behind the Dakota to prevent it from being driven.

Defendant discovered Alaimo had moved the truck and approached Alaimo who was sitting in the driver's seat of his locked F-150. Alaimo testified defendant yelled at and taunted him to get out of the vehicle so they could "settle this here and now." Alaimo did not get out of the vehicle, but instead called 911.

While Alaimo was on the phone, defendant entered the Dakota. Alaimo proceeded to slightly reposition the F-150 to further prevent defendant from leaving the parking lot with the Dakota. However, defendant reversed the Dakota, twice ramming it into the F-150 before driving over the curb and sidewalk to flee the parking lot. Police officers responded to the scene, and one officer attempted to pursue defendant as he drove away. However, defendant was not apprehended at the time, nor was the vehicle located.

For the next couple of weeks, Alaimo repeatedly attempted to contact defendant to return his truck. Despite these attempts, defendant never brought the Dakota back. Alaimo eventually recovered the Dakota, which had sustained damages, from a Las Vegas tow yard. Defendant was ultimately arrested in Las Vegas.

3. Procedural History

The Orange County District Attorney charged defendant with carjacking (§ 215, subd. (a)), assault with a deadly weapon (§ 245, subd. (a)(1)), and unlawful taking of a vehicle (Veh. Code, § 10851, subd. (a)). The jury found defendant guilty of carjacking and unlawful taking of a vehicle, but not guilty of assault with a deadly weapon.

After dismissing one of defendant's prior strikes and his prison prior, the trial court sentenced him to 16 years in state prison. Defendant's sentence included three years for carjacking, doubled pursuant to a prior strike; two years for unlawful taking of a vehicle, doubled pursuant to a prior strike; and an additional five year term for each prior serious felony conviction.

Defendant timely appealed arguing the trial court erred in denying his motion for judgment of acquittal under section 1118.1, and in failing to stay his sentence for unlawful taking of a vehicle pursuant to section 654.

DISCUSSION

1. Standard of Review

In reviewing a trial court's ruling under section 1118.1, we independently examine the record to determine whether the evidence is sufficient to support a conviction. (*People v. Cole* (2004) 33 Cal.4th 1158, 1213 ["We review independently a trial court's ruling under section 1118.1 that the evidence is sufficient to support a conviction"].)

Furthermore, we apply the substantial evidence standard in determining whether section 654 prohibits a particular sentence as double punishment for the same act or omission. (*People v. Saffle* (1992) 4 Cal.App.4th 434, 438 ["The determination of whether there was more than one objective is a factual determination, which will not be

reversed on appeal unless unsupported by the evidence presented at trial"]; *People v. Monarrez* (1998) 66 Cal.App.4th 710, 713.)

2. Trial Court's Denial of Motion for Judgment of Acquittal

Generally, a defendant may move for a judgment of acquittal if there is insufficient evidence before the court to support a conviction for an offense. (*People v. Dement* (2011) 53 Cal.4th 1, 46.) Section 1118.1 provides, in pertinent part, "In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal."

"In ruling on a motion for judgment of acquittal pursuant to [Penal Code] section 1118.1, a trial court applies the same standard an appellate court applies in reviewing the sufficiency of the evidence to support a conviction, that is, "'whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged."'" (*Cole, supra*, 33 Cal.4th at pp. 1212-1213.) The sufficiency of the evidence is tested as it stood at the time the defendant submits his or her motion. (*Id*. at p. 1213 ["Where the section 1118.1 motion is made at the close of the prosecution's case-in-chief, the sufficiency of the evidence is tested as it stood at that point"].) In this case, defendant moved for judgment of acquittal after the prosecution's case-in-chief, the defendant's case-in-chief, and in the midst of defendant's cross-examination of the victim on rebuttal.

2.1 Defendant's Carjacking Conviction

Defendant argues there was insufficient evidence at trial to support a conviction of carjacking. The Attorney General disagrees, contending there was sufficient

evidence for each element of carjacking to sustain a conviction. Carjacking is statutorily defined as "'the felonious taking of a motor vehicle in the possession of another, from his or her immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear.'" (*People v. Hill* (2000) 23 Cal.4th 853, 858-859; § 215, subd. (a).)

Defendant's argument on appeal focuses on whether or not Alaimo, as the victim, had constructive possession of the Dakota, which is but one of the elements of carjacking. This element is discussed at length below, but sufficient evidence also exists to support the other elements of carjacking.

First, "'felonious taking'" for both robbery and carjacking "requires that a defendant gain possession of the victim's property *and* asport or carry it away." (*People v. Lopez* (2003) 31 Cal.4th 1051, 1054-1055 ["Because the 'felonious taking' in the crime of robbery has an established meaning at common law and the same 'taking' language appears in the carjacking, robbery, and unlawful taking or driving of a vehicle statutes, we presume that the Legislature intended the same meaning, unless a contrary intent clearly appears"].) (*Id.* at pp. 1060-1061.) "'A *taking* occurs when the offender secures dominion over the property.'" (*Id*. at p. 1057.) Here, there is more than sufficient evidence supporting the felonious taking of the Dakota, especially since defendant does not dispute he gained possession of the vehicle in the parking lot before driving it away.

Second, the carjacking statute requires the defendant use force or fear to gain possession of the vehicle. (§ 215, subd. (a).) Fear has both a subjective component—whether the victim was actually fearful of harm—and an objective component—whether a reasonable person would be fearful in such circumstances. (*People v. Iniguez* (1994) 7 Cal.4th 847, 857-858.) Moreover, intimidation may satisfy the "fear" element if "'"it can

be established by proof of conduct, words, or circumstances reasonably calculated to produce fear."'" (*People v. Brew* (1991) 2 Cal.App.4th 99, 104.)

Here, sufficient evidence of force *and* fear exists to support defendant's conviction for carjacking. For one, Alaimo testified he remained in his vehicle because he was afraid of defendant who is much larger than him and who had been taunting and yelling at Alaimo to get out of the vehicle to "settle this here and now." Because a reasonable person in Alaimo's position would fear for his or her safety and Alaimo did in fact testify he was subjectively afraid, there is sufficient evidence to support the "fear" factor. Furthermore, if fear was not enough, it is undisputed that defendant used considerable force to take possession of the Dakota by ramming the truck into the F-150 while Alaimo was inside in order to maneuver out of the parking space and drive away. Therefore, it is evident defendant used force *and* fear to gain possession of the vehicle.

Third, the evidence presented at trial overwhelmingly supports the theory the Dakota was removed from Alaimo's possession against his will. (§ 215, subd. (a).) For one, Alaimo repeatedly demanded defendant return the Dakota and eventually tracked down the location of defendant to retrieve what he believed to be his vehicle. After using his own set of keys to move the Dakota to a different location, he attempted to prevent its taking by confining the vehicle in a parking space. These actions strongly indicate Alaimo did not want defendant to use or have possession of the Dakota. Additionally, the record reflects Alaimo's numerous attempts and considerable efforts both before and after the incident in question to obtain the Dakota from defendant's possession. Thus, sufficient evidence existed at the time defendant moved for judgment of acquittal indicating the vehicle was taken against Alaimo's will.

Furthermore, a defendant must have an intent to either temporarily or permanently deprive the victim of possession of the vehicle. (§ 215, subd. (a).) Here, the record strongly supports that not only did defendant have an intent to temporarily deprive Alaimo of the Dakota, which is evidenced by his extreme behavior to maneuver out of

the confined parking space to drive away, but that he also had an intent to permanently deprive Alaimo of possession by taking the vehicle to a different city and then to a different state where Alaimo would have great difficulty in recovering it. Thus, there was sufficient evidence to support the aforementioned elements of carjacking to sustain defendant's conviction.

2.2 The Element of Possession

Defendant focuses on the sufficiency of the evidence to support the theory Alaimo had possession of the Dakota. The Attorney General maintains Alaimo's actions preceding the alleged carjacking, coupled with his close proximity to the vehicle, constituted constructive possession for purposes of carjacking. After reviewing the record, it is clear there was sufficient evidence at the time defendant moved for a judgment of acquittal that Alaimo constructively possessed the Dakota to support the carjacking conviction.

Although the record shows the Dakota was licensed, registered, and insured in both Alaimo and Baca's names, that evidence only supports a claim of ownership. Because carjacking is a crime against possession and not ownership, our inquiry is whether sufficient evidence existed to support the theory Alaimo had constructive possession of the Dakota at the time of the alleged carjacking. (*People v. Cabrera* (2007) 152 Cal.App.4th 695, 698.)

Physical or actual possession is not required to support a carjacking conviction. (*In re Anthony J.* (2004) 117 Cal.App.4th 718, 728.) Borrowing from the consensus in robbery cases, it is sufficient if the victim has some "loose custody" (*People v. Hamilton* (1995) 40 Cal.App.4th 1137, 1143) of the property and is either currently exercising dominion or control over it, or at least may be said to represent or stand in the shoes of the true owner. (*Id.* at p. 1142; *People v. DeFrance* (2008) 167 Cal.App.4th 486, 497.) Although presence, in and of itself, is insufficient evidence of possession, a vehicle

"within a person's immediate presence . . . is sufficiently within his control . . . [if] he could retain possession of it if not prevented by force or fear." (*People v. Johnson* (2015) 60 Cal.4th 966, 989, quoting *People v. Gomez* (2011) 192 Cal.App.4th 609, 623, disapproved on another ground in *People v. Elizade* (2015) 61 Cal.4th 523, 538, fn. 9; *In re Anthony J., supra*, 117 Cal.App.4th at p. 728 [mere presence near the stolen property, in and of itself, is insufficient evidence of possession].)

In reviewing the record, there is ample evidence Alaimo exercised dominion and control over the Dakota to constitute constructive possession to support defendant's conviction for carjacking. For one, Alaimo had control of the Dakota because he could have retained possession of the vehicle had it not been for defendant's threats and use of force. (*Johnson*, *supra*, 60 Cal.4th at p. 989.) Immediately preceding the incident, Alaimo used his keys to access the Dakota to drive it to a different parking lot. Alaimo remained in the F-150 because he was afraid of defendant who had made threats against him just outside his window. And when Alaimo called 911, defendant got into the Dakota and used considerable force in ramming the vehicle into the F-150 to maneuver his way out of the parking space. Had it not been for defendant's actions, Alaimo would have remained in close proximity of and had control over movement of the vehicle.

Second, Alaimo situated his F-150 into a position to confine the Dakota after regaining possession of it so that defendant would not be able to take it again. Alaimo's efforts to secure the Dakota in that particular parking space indicate he exercised dominion over it before defendant arrived.

In other words, Alaimo's ability to access the Dakota through his own set of keys, drive it across the street, and to confine it are actions that support the theory Alaimo exercised control and dominion over the Dakota, or had at least "loose custody" of it, immediately preceding the carjacking. (See *DeFrance*, *supra*, 167 Cal.App.4th at p. 499 [the victim, who is the mother of the vehicle's owner, had constructive possession of the vehicle because she "not only knew about the car, but had a connection to it. She had

helped her son buy it, had access to the keys, had driven it, and was named on the insurance. The car was kept in one of the parking spaces designated for the condominium, close enough that she was able to respond when defendant tried to steal it. From these facts, the jury could conclude that [the victim] had sufficient 'loose custody' over the car to be a victim of robbery"].) Thus, there was sufficient evidence at the time defendant moved for judgment of acquittal to support his conviction for carjacking.

Defendant's reliance on *People v. Coleman* (2007) 146 Cal.App.4th 1363 (*Coleman*) is not persuasive. In *Coleman*, the defendant entered a shop, pointed a gun at the office manager, and demanded she give him the keys to the shop owner's personal vehicle parked outside. (*Id*. at p. 1366.) The manager remained in the shop while the defendant left the store and drove off in the owner's vehicle. (*Ibid*.)

Unlike the office manager in *Coleman*, Alaimo was not so "far removed" from the situation to not be considered a victim. (*People v. Coleman, supra,* 146 Cal.App.4th at p. 1373.) First, Alaimo remained just feet away from the Dakota throughout the entire carjacking, whereas the office manager in *Coleman* was only present during the threat of force (i.e., pointing of the gun demanding the keys). Second, immediately preceding defendant's actions, Alaimo had driven the Dakota and parked it in a particular spot to prevent defendant from taking it, where in fact the office manager in *Coleman* had never driven the vehicle before or exercised control over it. Third, defendant rammed the Dakota into the F-150 while Alaimo occupied the latter vehicle, unlike the situation in *Coleman* where the defendant left with the owner's vehicle while the office manager remained in the building. At no point in time was the manager in *Coleman* in close proximity to the vehicle the defendant "carjacked." But, in this situation, Alaimo was in the immediate presence of the vehicle from the beginning of the carjacking to the end.

Thus, there was sufficient evidence before the trial court at the time defendant moved for a judgment of acquittal to support a conviction for carjacking. We therefore affirm the trial court's judgment in this regard.

3. Section 654's Bar to Multiple Punishment

Section 654 prohibits double punishment for multiple criminal convictions based on the same act or omission. (*People v. Siko* (1988) 45 Cal.3d 820, 822.) The statute provides, in pertinent part, "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).) The purpose of the statute is to ensure "a defendant's punishment will be commensurate with his culpability" and applies "when there is a course of conduct which violates more than one statute but constitutes an indivisible transaction." (*Saffle, supra*, 4 Cal.App.4th at p. 438.) As relevant here, "[s]ection 654 does not allow any multiple punishment, including either concurrent or consecutive sentences." (*People v. Deloza* (1998) 18 Cal.4th 585, 592.)

The Attorney General concedes defendant's concurrent term for unlawful taking of a vehicle should be stayed because his convictions for carjacking and unlawful taking of a vehicle were based on the same act. (See *People v. Dominguez* (1995) 38 Cal.App.4th 410, 419-420 [section 654 *precludes* separate punishments for a defendant's convictions for robbery and carjacking when the defendant used a threat of force to obtain the victim's vehicle and drove off in the vehicle with the vehicle's belongings].) In defendant's case, the trial court convicted him of both crimes which each stem from the same actions the day defendant forcibly removed the Dakota from Alaimo's possession.

The trial court sentenced defendant to six years in state prison for the carjacking conviction, and imposed a four year concurrent term for unlawful taking of a vehicle. In this regard, the trial court clearly erred. Section 654 specifically prohibits

defendant's concurrent sentence and such a concurrent term is exactly the type of punishment the statute is designed to prevent. Therefore, we grant defendant's appeal as to his section 654 argument only, and instruct the clerk to modify judgment to reflect a stay of the lesser offense of unlawful taking of a vehicle. (*People v. Duff* (2010) 50 Cal.4th 787, 796; *People v. Niles* (1964) 227 Cal.App.2d 749, 756.)

DISPOSITION

We affirm defendant's conviction. The sentence imposed for unlawful taking of a vehicle is ordered to be stayed pending completion of the sentence imposed for carjacking, with the stay to become permanent at that time. The clerk of the Superior Court of Orange County is directed to prepare an amended abstract of judgment reflecting the modified sentence and forward a copy to the Department of Corrections and Rehabilitation.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

MOORE, J.

ARONSON, J.